

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CHAD H. HAMBY, et al.

Plaintiffs,

POWER TOYOTA IRVINE, et al.,

Defendants.

Case No. 11cv544-BTM (BGS)

**ORDER RE EX PARTE
APPLICATION FOR DISCOVERY
AND STAY OF MOTION TO
COMPEL ARBITRATION**

Plaintiff moves ex parte for an order permitting him to conduct discovery on the issue of whether the arbitration clause and class action waiver are unconscionable and an order continuing the hearing date for Defendant's motion to compel arbitration.

Plaintiff asserts that under California Civil Code section 1670.5(b), he is entitled to discovery on this issue. This section confers Plaintiff with “a reasonable opportunity to present evidence as to [a contract’s] commercial setting, purpose, and effect” to aid the court in determining if the contract or any clause thereof is unconscionable.” § 1670.5(b). Although it is less than clear that this right “to present evidence” is equivalent to a right to obtain discovery materials to be used to argue that a contract or clause is unconscionable, there is limited authority for Plaintiff’s position. See *Wobb v. Ford Motor Co.*, 76 F.R.D. 452, 458 (W.D. Pa. 1977); *Carlson v. General Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989). Additionally, although neither side addresses this case, at least one court applying Ninth

1 Circuit precedent has held that a party opposing a motion to compel arbitration is entitled to
 2 discovery relevant to the issue of unconscionability. See *Coneff v. AT&T Corp.*, No.
 3 C06-0944RSM, 2007 U.S. Dist. LEXIS 20502, at *9 (W.D. Wash. Mar. 9, 2007). Absent
 4 Defendant citing – or independent research uncovering – any case law to the contrary, the
 5 Court finds *Coneff* persuasive on this issue.

6 Rather than challenge Plaintiff's right to discovery, the gravamen of Defendant's
 7 opposition is focused on the merits of whether Plaintiff can successfully argue that the
 8 arbitration clause at issue is unconscionable. Defendant is correct that after the Supreme
 9 Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750-1751
 10 (2011), Plaintiff can no longer rely on California's Discover Bank rule¹ to assert that the
 11 arbitration agreement is substantively unconscionable merely because it includes a class
 12 action waiver. See *Bellows v. Midland Credit Mgmt.*, No. 09CV1951-LAB, 2011 U.S. Dist.
 13 LEXIS 48237, at *11 (S.D. Cal. May 4, 2011); *In re Cal. Title Ins. Antitrust Litig.*, No.
 14 08-01341 JSW, 2011 U.S. Dist. LEXIS 71621, at *11 (N.D. Cal. June 27, 2011). However,
 15 *AT&T Mobility LLC* does not stand for the proposition that a party can never oppose
 16 arbitration on the ground that the arbitration clause is unconscionable. See *Shroyer v. New*
 17 *Cingular Wireless Servs.*, 498 F.3d 976, 981 (9th Cir. Cal. 2007) ("It is well-established that
 18 unconscionability is a generally applicable contract defense, which may render an arbitration
 19 provision unenforceable.")

20 For these reasons, Plaintiff's ex parte application is **GRANTED**. Plaintiff may conduct
 21 discovery on the issue of unconscionability, and the hearing date for the motion to compel
 22 arbitration is taken off calendar. Magistrate Judge Skomal shall decide the scope of
 23 discovery and all applicable deadlines. Magistrate Judge Skomal's chambers shall contact
 24 this Court's chambers to obtain a new hearing date for the motion to compel arbitration, as
 25 well as deadlines for the parties to file an amended opposition and reply. The hearing date
 26 and amended briefing schedule for the motion to compel arbitration shall be included in the
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28 ¹ This rule had classified most collective-arbitration waivers in consumer contracts as
 unconscionable. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1746.

1 discovery scheduling order.

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3 **IT IS SO ORDERED.**

4 DATED: July 18, 2011

Barry Ted Moskowitz

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6 Honorable Barry Ted Moskowitz
7 United States District Judge
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